(5)

No. 85-5221

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RANDALL LAMONT GRIFFITH, - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

In cases pending on direct appeal, should the holding in *Batson* v. *Kentucky* be given retroactive effect?

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STATEMENT OF THE CASE

September 8, 1982, an assailant took a purse at knifepoint from two women in a parking lot in Louisville, Kentucky. The assailant retreated to a nearby apartment complex. Petitioner resided in this apartment complex (TE II, pp. 134-136). Petitioner was identified by three eyewitnesses as the robber, (TE II, p. 240), and he was duly convicted of first-degree robbery and of being a second-degree persistent felony offender. He was sentenced to twenty years' imprisonment May 21, 1984 (A. 7-8).

In Kentucky, trial attorneys are given strike sheets listing the remaining members of the venire at the conclusion of voir dire. Peremptory challenges are

exercised simultaneously in private by the attorneys, and the court clerk then compiles a list of the remaining jurors (J.A. 5). In this case, which was tried in Louisville, Kentucky, May 15, 1984, the venire consisted of twenty-eight people. The defense exercised all nine of its peremptory challenges, and the prosecutor exercised all six of his peremptory challenges, four of the six against black prospective jurors. Since two prospective jurors were struck by both sides, fifteen jurors remained. Two of these prospective jurors were removed by random draw of the clerk, leaving thirteen jurors seated to hear the case. At least one of the two jurors removed by random draw of the clerk was black (J.A. 15). Although the trial judge thought the racial affiliation of two prospective jurors was indeterminate (J.A. 12), the opinion of petitioner's trial counsel that an all-white jury had been seated was not contested (J.A. 15).

Before the results of the peremptory strikes became known to the parties, petitioner's trial counsel raised the possibility that the black defendant would be tried by an all-white jury. Petitioner's trial counsel requested the court to make a record of the race of the persons struck by the prosecutor and the reasons for the prosecutor striking any blacks if an all-white jury had been selected. The prosecutor took offense from the remarks of petitioner's trial counsel (J.A. 10). The trial judge believed the prosecutor's assertion that he had not struck any member of the panel on account of their race (J.A. 11). The prosecutor noted that he was under no legal obligation to explain his reasons for

exercising any of his peremptory challenges. However, in the heat of argument, he gratuitously explained his reasons for exercising four of his peremptory challenges. He stated that he struck a young black man and a young black woman for the same reason that he struck a young white man, namely, their age. The prosecutor stated he didn't want jurors in the same age category as the petitioner and that, furthermore, studies have shown young persons are less "law and order" citizens (J.A. 14). The prosecutor also stated he struck a white male juror on the basis of his occupation. One of the black jurors, Olivia Williams, was peremptorily challenged by both parties. Thus, only two of the prosecutor's six peremptory challenges went unexplained, and one of those two may very well have been Ms. Williams, who was viewed as undesirable by both parties.

The trial judge ruled that the prosecutor did not have to give reasons for his peremptory challenges (J.A. 16). The trial judge also denied a motion to discharge the panel due to the prosecutor's use of peremptory challenges. Petitioner claimed the prosecutor's use of peremptory challenges violated the Sixth and Fourteenth Amendments to the Constitution of the United States of America (J.A. 15). Petitioner's conviction was affirmed by the Supreme Court of Kentucky on June 13, 1985. In its opinion, the Supreme Court of Kentucky declined to depart from the decision in *Swain* v. *Alabama,* 380 U. S. 202 (1965). April 30, 1986, this Court overruled *Swain* in *Batson* v. *Kentucky,* 476 U. S. ——, 106 S. Ct. 1712 (1986). June 2,

1986, certiorari was granted herein to consider whether *Batson* should be applied to cases still pending on direct review.

SUMMARY OF ARGUMENT

Certiorari was granted in this case to consider whether the holding in *Batson* v. *Kentucky, supra,* should be applied retroactively to convictions which had not become final by the date of the *Batson* opinion. At the time of the *Batson* opinion, petitioner's petition for certiorari was still pending in this Court. Subsequent to the grant of certiorari in this case, the Court ruled in *Allen* v. *Hardy,* 476 U. S. ——, 106 S. Ct. 2878 (1986), that *Batson* will not be applied retroactively to cases on collateral review. Respondent submits that *Batson* likewise should not be applied retroactively to appeals which are not final. Respondent believes that *Shea* v. *Louisiana,* 470 U. S. ——, 105 S. Ct. 1065 (1985), established by necessary implication a new retroactivity rule for all nonfinal appeals. Under *Shea,* new rules of criminal procedure derived from the Constitution will be applied to all nonfinal convictions unless the situation was clearly controlled by existing retroactivity precedents to the contrary. In so holding, the Court merely broadened the applicability of the holding in *United States* v. *Johnson,* 457 U. S. 537 (1982). *Johnson* had been limited to Fourth Amendment cases. The Court in *Shea* concluded there was nothing about the *Johnson* formula that made it more appropriate for a Fourth Amendment claim than a Fifth Amendment claim, and therefore applied the

Johnson rule to find *Edwards* v. *Arizona,* 451 U. S. 477 (1981), retroactive to cases pending on direct appeal. The retroactivity issue is not determined by the provision of the Constitution on which a new constitutional rule of procedure is based. *Johnson* v. *New Jersey,* 384 U. S. 719 (1966). Accordingly, the *United States* v. *Johnson* analysis of retroactivity applies as well to the equal protection rule established in *Batson.*

United States v. *Johnson, supra,* reanalyzed past precedent and determined that a new rule which makes a clear break in the law is preordained to be found nonretroactive. This Court already observed in *Allen* v. *Hardy* that "(t)he rule in *Batson* v. *Kentucky* is an explicit and substantial break with prior precedent." 106 S. Ct. at 2880. *United States* v. *Johnson* defined a clear break case as, *inter alia,* a decision that explicitly overrules past precedent. *Batson* overruled *Swain* v. *Alabama,* 380 U. S. 202 (1965). *Allen* v. *Hardy,* 106 S. Ct. at 2880. *Batson* is plainly a clear break case which under the *Johnson* analysis is not retroactive to cases pending on direct review.

Consideration of past retroactivity precedents preserved by the *Johnson* decision likewise indicates that *Batson* should not be retroactive. *De Stefano* v. *Woods,* 392 U. S. 631 (1968), found the right to a trial by jury for serious crimes and the same right for serious criminal contempts to be nonretroactive. Likewise, *Daniel* v. *Louisiana,* 419 U. S. 522 (1975), found *Taylor* v. *Louisiana,* 419 U. S. 522 (1975) to be nonretroactive. *Taylor* involved the unconstitutional exclusion of women from jury pools by use of an exemption provi-

sion. The *Daniel* court found the retroactivity of *Taylor* to be controlled by the decision in *De Stefano* v. *Woods, supra.*

Petitioner argues that application of the retrospectivity criteria stated in *Stovall* v. *Denno,* 388 U. S. 293 (1967), result in a finding that *Batson* should be retroactive on direct review. Respondent does not believe the *Stovall* criteria are applicable. Even if they are, this Court correctly ruled in *Allen* v. *Hardy,* 476 U. S. ——, 106 S. Ct. 2878 (1986), that the *Stovall* analysis does not warrant retrospective application of *Batson* on collateral review. Respondent submits the same conclusion applies on direct review.

Finally, respondent urges that the Court decline petitioner's invitation to overrule existing retroactivity precedents and adopt Justice Harlan's views in full as expressed in his opinions in *Desist* v. *United States,* 394 U. S. 244 (1969), and in *Mackey* v. *United States,* 401 U. S. 667 (1971). The Harlan approach does not reflect the legitimate concerns which underlie the doctrine of nonretroactivity, namely, justifiable reliance on past law and adverse impact on the administration of justice. Accordingly, the Harlan approach, which has never been adopted by this Court, is not a desirable approach to retroactivity.

ARGUMENT

I. Retrospective Application of a Constitutional Decision to Nonfinal Criminal Convictions Is Governed by the Analysis Employed in (1965), in *United States* v. *Johnson.*

In *Linkletter* v. *Walker,* 381 U. S. 618 (1965) this Court began examining the issue of retrospective application of its decisions announcing new procedural rules for criminal cases derived from the Federal Constitution. The Court noted the development of retrospectivity in civil cases based on the concern that "... judicial repeal oftime did 'work hardship to those who [had] trusted to its existence.' " 381 U. S. at 624. The Court held the rule of *Mapp* v. *Ohio,* applying the exclusionary rule of *Weeks* v. *United States* to the states, not to apply retroactively to cases on collateral review. The Court decided to approach the question on a case-by-case basis, looking to the purpose of the new rule, the reliance placed on prior law, and the effect on the administration of justice of retrospective application of the new rule. 381 U. S. at 636.

This basic approach was restated in and became known as the rule of *Stovall* v. *Denno,* 388 U. S. 293 (1967):

> "These cases establish the principle that in criminal litigation concerning constitutional claims, 'the court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application'. . . ." [citation omitted]. The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. 388 U.S. at 296, 297.

Stovall held that the right to counsel during pretrial identifications established in *United States* v. *Wade*

and *Gilbert* v. *California* would not be applied retroactively. The *Stovall* court found no reason to distinguish between direct appeals and collateral proceedings in this regard. The Court in *Stovall* was not troubled by the fact that Wade and Gilbert would be the only defendants to benefit retrospectively from the new rule. This anomaly was deemed an unavoidable consequence of the necessity that constitutional decisions not stand as mere dictum. Also, the Court observed that this possible benefit to parties to a case gave counsel an incentive to advance contentions requiring a change in the law.

United States v. *Johnson*, 457 U. S. 537 (1982), marked a significant change in the retroactivity analysis employed by this Court for its constitutional rulings in criminal cases. The analysis used in *Stovall* v. *Denno*, *supra*, and relied on in many other cases, was replaced in *Johnson*, *supra*, with a rule borrowed in part from Justice Harlan's opinions in *Mackey* v. *United States*, 401 U. S. 667 (1971), and in *Desist* v. *United States*, 394 U. S. 244 (1969). Mr. Justice Harlan came to advocate the retrospective application of new constitutional rulings to all criminal cases that have not yet become "final".[1] Conversely, he advocated that such new rules of criminal procedure should only on the rarest occasions be applied to collateral

[1]Finality in this context means a judgment of conviction has been rendered, the availability of appeal has been exhausted, and the time to petition for certiorari has elapsed or such a petition has been finally denied prior to the date of the new constitutional ruling. *Linkletter* v. *Walker*, *supra*, at 618, 622, n.5.

attacks on criminal judgments. *United States* v. *Johnson* concluded that retroactivity must be rethought. However, the Court determined not to disturb existing retroactivity precedents. 457 U. S. 540, 554. Furthermore, the *Johnson* Court adopted a threshold test based on three categories of cases it believed had not really been governed by the *Stovall* test. The new *Johnson* rule favoring retroactive application of new decisions to nonfinal cases was only applied in *Johnson* because the new decision at issue, *Payton* v. *New York*, 445 U. S. 573 (1980), did not fall into any one of the following three threshold categories.

First, when a decision of this Court merely applies settled precedents to new facts, the new case has applies retroactively to earlier cases, as there is no real change in the law. Second, full retroactivity is necessary when it is determined a trial court lacked authority to convict or punish a defendant. Third, when the Court declares a rule of criminal procedure a clear break with the past, nonretroactivity is effectively preordained. 457 U. S. at 553, 554, 558. In addition to these limitations on the adoption of Justice Harlan's formula, *Johnson* was limited to cases arising under the Fourth Amendment. The question of retrospectivity on collateral review cases was also left to another day. 457 U.S. at 562.

The next significant retroactivity case, *Solem* v. *Stumes*, 465 U. S. 638 (1984), concerned a postconviction proceeding in which it was claimed that the prophylactic Fifth Amendment rule of *Edwards* v.

Arizona, 451 U. S. 477 (1981), should be applied retroactively. In *Solem*, the Court restated the *Johnson* rule as follows:

> "Johnson held that a decision construing the Fourth Amendment that was not a 'clear break with the past' is to be applied to all convictions not yet final when the decision was handed down." 104 S. Ct. at 1341.

The *Solem* Court declined to follow *Johnson* since *Solem* was controlled by prior precedent, involved collateral as opposed to direct review, and did not involve the Fourth Amendment. The Court in *Solem* simply applied the previous *Stovall* analysis to conclude that *Edwards* should not be applied retroactively on collateral review.

Shea v. *Louisiana*, 470 U. S. —, 105 S. Ct. 1065 (1985), was another Fifth Amendment case concerning the retroactive application of *Edwards* v. *Arizona*, 451 U. S. 477 (1981), to a case not yet final at the time *Edwards* was decided. The *Shea* Court held that *Edwards* would apply retroactively to all cases pending on direct appeal, adopting the reasoning of *United States* v. *Johnson*, *supra*. The *Shea* Court noted that while *Johnson*, *supra*, was limited to Fourth Amendment cases, there is nothing about the *Johnson* analysis that makes it more appropriate for a Fourth Amendment rule than a Fifth Amendment rule. Accordingly, *Edwards* was deemed to apply to all cases still pending on direct review. The *Shea* Court declined to specifically rule on the clear break exception in the

Fifth Amendment context, as *Edwards* was "not the kind of clear break with the past that is automatically nonretroactive." *Solem* v. *Stumes*, *supra*, at 647.

Allen v. *Hardy*, 476 U. S., —, 106 S. Ct. 2878 (1986), held in a per curiam opinion that the new rule announced in *Batson* v. *Kentucky*, *supra*, does not apply retroactively when the issue is raised in a post conviction proceeding. The Court in *Allen* expressed no opinion concerning the retroactivity of *Batson* when the issue is raised via direct appeal. As in *Solem* v. *Stumes*, *supra*, the Court in *Allen* applied the *Stovall* v. *Denno* analysis to determine that *Batson* would not be applied retroactively to postconviction cases.

The foregoing authorities suggest that two retroactivity formulas apply to criminal cases, one for nonfinal convictions and another for postconviction proceedings. The upshot of *Shea*, *supra*, is that the *Johnson* retroactivity analysis now expressly applies to nonfinal cases concerning new constitutional rules implementing both the Fourth and Fifth Amendments. However, there is nothing about the *Johnson* analysis that weds it to any particular constitutional right, as pointed out in *Shea*. Therefore, it may reasonably be supposed that the *Johnson* analysis likewise applies to the equal protection issue decided in *Batson* v. *Kentucky*, 106 S. Ct. 1712 (1986). Indeed, in *Pembaur* v. *City of Cincinnati*, 106 S. Ct. 1292 (1986), it was stated without limitation that *Shea* v. *Louisiana*, *supra*, created a distinction between retroactivity on direct review and on collateral attack of a conviction. (JJ.

Powell, Rehnquist, and the Chief Justice, dissenting.) Accordingly, it appears that the retroactivity of *Batson* to nonfinal cases is to be decided by reference to the analysis employed in *United States* v. *Johnson*, *supra*.

II. The Holding of *Batson* Constitutes a Clear Break With the Past and Prospectively Is Therefore Preordained by This Court's Decisions.

Application of the retroactivity analysis of *United States* v. *Johnson*, 457 U. S. 537 (1982), to this case requires examination of previous retroactivity precedents to determine if *Batson* is exempt from *Johnson's* preference for retroactivity. This was done in *Johnson* by consideration of *Johnson's* "threshold test." One prong of that test is whether a new rule of criminal procedure constitutes a "clear break with the past." *Johnson* notes that such rules have almost invariably been found to be nonretroactive. *Johnson*, *supra*, 457 U. S. at 549. *Johnson* concludes that a determination that a rule is a clear break in the law effectively preordains nonretroactivity. 457 U. S. 553, 554, 558. This Court has already decided in *Allen* v. *Hardy*, 476 U. S. —, 106 S. Ct. 2878 (1986), that "[t]he rule in *Batson* v. *Kentucky* is an explicit and substantial break with prior precedent." 106 S. Ct. at 2880. This ruling in *Allen* v. *Hardy* was absolutely correct and warrants denial of retroactive effect to cases raising the Batson issue on direct review.

United States v. *Johnson* rejected the contention that *Payton* v. *New York*, 445 U. S. 573 (1980), constituted a "clear break" in the law, noting the question in *Payton* had been expressly left open in prior cases, and was not an unanticipated rule of law. The *Johnson* Court defined a sharp break in the law as when a decision explicitly overrules a past precedent, disapproves a practice the Supreme Court has arguably sanctioned, or when a longstanding and widespread practice to which this Court has not spoken, but which nearly all lower courts have approved, is overturned. (457 U. S. at 551.)

Batson v. *Kentucky* obviously comes within this definition of a sharp break in the law. It explicitly overruled *Swain* v. *Alabama*, 380 U. S. 202 (1965), a precedent which had been widely relied on for more than twenty years. In *Swain*, this Court rejected a claim that it was a violation of the Fourteenth Amendment for the prosecutor to strike all blacks from the venire through the use of peremptory challenges in a trial of a black man. In Part II of the *Swain* opinion, it is said:

> "Alabama contends that its system of peremptory strikes—challenges without cause, without explanation and without judicial scrutiny — affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial. *This system*, it is said, *in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes.* Based on the history of this system and its actual use and operation in

this country, *we think there is merit in this position.* (380 U. S. 211-212.) (Emphasis added.)

* * *

"While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. [Citation omitted]. It is often exercisable upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' [Citation omitted] upon a jurior's habits and associations,' [Citation omitted] or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment.' [Citation omitted.] It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.

* * *

"With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and White, Protestant and Catholic, are alike subject to being challenged without cause. *To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail*

a radical change in the nature and operation of the challenge. The challenge, pro tanto, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. *And a great many uses of the challenge would be banned.*

"In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. *The presumption is not overcome* and the prosecutor therefore subjected to examination *by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes.* Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. Hence the motion to strike the trial jury was properly denied in this case." (380 U. S. 220, 221, 222) (Emphasis added).

Thus, *Swain* clearly held in Part II thereof that if a prosecutor decided to strike all blacks from a venire based on the circumstances of a particular case involving a black defendant, it was not a violation of the Equal Protection Clause of the Fourteenth Amend-

ment to do so. This was true even if the prosecutor struck black prospective jurors simply because they were black. It was inherent in the nature of the peremptory challenge that ". . . Negro and white, Protestant and Catholic, are alike subject to being challenged without cause."

Batson overruled *Swain* in this regard, abolishing the peremptory nature of the peremptory challenge for a certain class of trials. *Batson,* 106 S. Ct. at 1723. *Batson* was not, as petitioner's brief contends, merely a modification of the standard of proof necessary to prove an equal protection claim. *Batson* was a clash of competing legal principles affecting trials, namely, the equal protection claims of black defendants versus the system of peremptory challenges. The result of this clash was the overruling of *Swain* v. *Alabama's* holding that a prosecutor may strike blacks in particular cases on account of their race:

> "Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, so long as that reason is related to his view concerning the outcome' of the case to be tried, [citation omitted] the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."

Batson, 106 S. Ct. at 1718, 1719. This overruling of *Swain, Batson,* 106 S. Ct. at 1725, fn. 25, was not due to application of evolving burden of proof standards

in jury venire or Title VII cases. It was simply a reassessment of the conflicting interests of equal protection and the peremptory challenge system. The "case after case" proof requirement of *Swain* was not merely an evidentiary formulation. It was based on the ruling that exercise of peremptories on the basis of racial affiliation could be constitutional in particular cases. *Batson* v. *Kentucky,* (Rehnquist, J., dissenting) 106 S. Ct. at 1743.

This reading of *Batson* demonstrates that *Batson* indeed was ". . . an avulsive change which caused the current of the law thereafter to flow between new banks." *Hanover Shoe* v. *United Shoe Machinery Corp.,* 392 U. S. 481 (1968). *Swain* approved of the use of peremptories that *Batson* attempts to outlaw. If *Batson* is not a "clear break" case, respondent doubts another will ever be found. However, even if, as petitioner argues, *Batson* simply concerned a change in the evidentiary burden of proof placed on a criminal defendant claiming denial of equal protection through the state's use of peremptory challenges, the result is the same. No prosecutor or judge could have reasonably anticipated that this Court would resolve the competing interests of equal protection and the peremptory challenge by adopting the particular procedural rules created in *Batson.* Accordingly, *Batson* is obviously a clear break case whether the case is deemed to merely be a change in evidentiary rules or also to be a change in the permissible uses of peremptory challenges.

Desist v. *United States*, 394 U. S. 244 (1969), held that *Katz* v. *United States*, 389 U. S. 347 (1967), which ruled electronic eavesdropping to constitute a search subject to the Fourth Amendment, was not retroactive. "However clearly our holding in *Katz* may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future." 394 U. S. at 248. See, also, *Williams* v. *United States*, 401 U. S. 646 (1971), which declined to find *Chimel* v. *California*, 395 U. S. 752 (1969), retroactive. *Chimel* overruled precedents on the scope of a search incident to arrest which had long been suspect in light of subsequent cases.

Solem v. *Stumes*, 465 U. S. 638 (1984), reiterated that even when a precedent is disreputable in light of other decisions, authorities are entitled to rely on such a precedent, whose overruling would still be a "clear break" in the law. 465 U. S. at 646, fn. 6. Thus, petitioner's apparent claim that *Batson* was foreshadowed by other equal protection decisions since *Swain* is of no moment, even if it is true.

Johnson v. *New Jersey*, 384 U. S. 719 (1966), which held *Miranda* and *Escobedo* to be nonretroactive, likewise emphasizesd the importance of the fact that these decisions overruled prior Supreme Court cases. In light of such overrulings, the reliance interests of law enforcement officers and courts and the resulting effect on the administration of justice counseled strongly in favor of nonretroactivity. Police, prosecutors, and

judges were not required to anticipate the *Miranda* decision based on the previous decision in *Escobedo*.

In summary, petitioner has done nothing to show that this Court erred in describing the *Batson* decision in *Allen* v. *Hardy* as ". . . an explicit and substantial break with prior precedent." 106 S. Ct. at 2880. Accordingly, *United States* v. *Johnson*, *supra*, as extended by *Shea* v. *Louisiana*, *supra*, requires that the new *Batson* rule should not be applied to nonfinal cases tried prior to the date of the *Batson* decision.

III. Retroactivity of Batson Is Also Controlled by the Precedents Established in *Daniel* v. *Louisiana* and *Destefano* v. *Woods*.

In rethinking retroactivity, the majority in *United States* v. *Johnson*, *supra*, was careful to preserve existing retroactivity precedents. Two prior cases involving the nature of the jury were *DeStefano* v. *Woods*, 392 U. S. 631 (1968), and *Daniel* v. *Louisiana*, 420 U. S. 31 (1975). *DeStefano*, *supra*, concerned the retroactivity of *Duncan* v. *Louisiana*, which held that states cannot deny the right to jury trials in serious criminal cases, and *Bloom* v. *Illinois*, which applied the right to a jury trial to serious criminal contempts. *DeStefano* repeated the observation in *Duncan* that "[w]e would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge alone as he would be by a jury." 392 U. S. 633, 634. Applying the *Stovall* v. *Denno* criteria, the right to a jury trial in these contexts was found to be non-

retroactive.[2] If total elimination of the right to a jury trial did not provoke a finding of retrospectivity, it is difficult to see how the rule of *Batson* could warrant retrospective application. *Batson* will at most accomplish a minor change in jury composition. *DeStefano* is clear precedent warranting prospective application of *Batson*.

Daniel v. *Louisiana, supra,* is even closer factually to the situation in *Batson*. *Daniel* held that *Taylor* v. *Louisiana,* 419 U. S. 522 (1975), was not retroactive to trials conducted prior to the date of the *Taylor* decision. *Taylor* found a state exemption provision excluded women from jury venires in violation of the Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community. What was said in *Daniel* about the considerations affecting the retroactivity of *Taylor* is equally compelling in the case at bar:

> In Taylor, as in Duncan, we were concerned generally with the function played by the jury in our system of criminal justice, more specifically the function of preventing arbitrariness and repression. In Taylor, as in Duncan, our decision did not rest on the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of the Sixth Amendment. In Taylor, as in Duncan, the reliance of law enforcement officials and state legislatures on prior decisions of this Court, such as Hoyt v. Florida, 368 U. S. 57, 7 L. Ed. 2d 118, 82 S. Ct. 159 (1961), in structuring their criminal justice systems is clear. Here, as in Duncan, the requirement of retrying a significant number of persons were Taylor to be held retroactive would do little, if anything, to vindicate the Sixth Amendment interest at stake and would have a substantial impact on the administration of criminal justice in Louisiana and in other States whose past procedures have not produced jury venires that comport with the requirement enunciated in Taylor." 420 U. S. 32, 33.

[2] Of course, application of the Sixth Amendment jury trial right to the states also meets the "clear break" standard of *United States* v. *Johnson, supra.*

The Court in *Daniel* said ". . . the retroactive application of Taylor is clearly controlled by our decision in *DeStefano* v. *Woods*. . . ." Although the case at bar is an equal protection case rather than a Sixth Amendment case, the result is still controlled by *Daniel, supra,* as *Batson* is likewise a new rule concerning proper jury composition.

Brown v. *Louisiana,* 447 U. S. 323 (1980), does not support a different result. *Brown* concerned retrospective application of *Burch* v. *Louisiana,* 441 U. S. 130 (1979), which held that a nonunanimous six-person jury violated the Sixth Amendment right to a jury trial for serious criminal offenses. The Court ordered that *Burch* would be applied retroactively to cases pending on direct appeal. However, there was no majority opinion. The plurality opinion noted that *Burch* was not a clear break in the law, but instead struck down a provision of dubious constitutionality. Burch did not overrule any prior decision or invalidate

a practice of heretofore unquestioned legitimacy. 447 U. S. at 335. Consequently, the reliance interests of the states were not as great as in clear break cases. Moreover, the Burch rule was based on constitutional jury size and unanimity limits which necessarily go to the heart of the truth-finding function. The *Burch* rule was said to be designed to preserve the substance of the jury trial right and assure the reliability of jury verdicts. Since the purpose of the rule went to the heart of the truth-finding function and clearly favored retroactivity, the reliance interests of states and the impact on administration of justice were clearly outweighed.

The *Bateon* rule is far different in that it serves multiple ends and was not intended to have such a substantial impact on the reliability of verdicts. The Court had to engage in line-drawing in *Burch* and assumed juries below its size requirements were unreliable. No such assumption applies in *Batson*. Hence, *Brown* v. *Louisiana, supra*, is not authority for retroactive application of *Batson*.

IV. If the *Stovall* v. *Denno* Formula Still Controls Retrospective Application of Equal Protection Rules to Nonfinal Appeals, Then This Court Decided the Issue Correctly in *Allen* v. *Hardy*.

Respondent has shown that *United States* v. *Johnson's* formula for retroactivity compels a finding that *Batson* is not applicable to other cases pending on direct review at the time of the *Batson* decision. Respondent has assumed from the language in *Shea* v.

Louisiana, 470 U. S. ——, 105 S. Ct. 1065 (1985), that the *Johnson* standard is now applicable to direct appeals regardless of the constitutional provision involved in a new criminal procedure ruling of this Court. If respondent is wrong in extending the *Johnson* reasoning to the equal protection claim in the case at bar, then authority prior and subsequent to *Johnson* indicates the retrospectivity formula of *Stovall* v. *Denno*, 388 U. S. 293 (1967), controls this case. *See, e.g., Solem* v. *Stumes*, 465 U. S. 638 (1984). Of course, this Court has already ruled in *Allen* v. *Hardy*, 476 U. S. ——, 106 S. Ct. 2878 (1986), that application of the *Stovall* criteria results in a conclusion that *Batson* is not retroactive. Petitioner has shown nothing that warrants a reconsideration of this ruling. The *Stovall* test weighs three factors. They are the purpose to be served by the new standards, the extent of the reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards. *Allen* v. *Hardy*, 106 S. Ct. at 2880. *Allen* notes that a decision announcing a new standard is almost automatically nonretroactive where the decision is a clear break with past precedent, citing *Solem* v. *Stumes, supra*. *Allen* likewise notes that "... the rule in Batson v. Kentucky is an explicit and substantial break with prior precedent." Concerning the first *Stovall* factor, the purpose to be served by the new rule, Allen notes that retroactive effect is appr iate where the new constitutional principle is designed to enhance the accuracy of criminal trials. However, the fact that a rule may have some impact on

the accuracy of a trial does not compel a finding of retroactivity. "The question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." *Johnson* v. *New Jersey*, 384 U. S. 719, 728-729 (1966). *Allen* notes that the purpose to be served by the rule weighs in favor of retroactivity where the standard goes to the heart of the truth-finding function. *Batson* is not such a case, as is shown above by the comparison with *DeStefano* v. *Woods*, 392 U .S. 631 (1968), and *Daniel* v. *Louisiana*, 420 U. S. 31 (1975). *See, also, Johnson* v. *New Jersey*, 384 U. S. 719 (1966) (*Miranda* v. *Arizona* and *Escobedo* v. *Illinois* nonretroactive); *Stovall* v. *Denno*, 388 U. S. 293 (1967) (right to counsel during pretrial identifications nonretroactive); *Tehan* v. *Shott*, 382 U. S. 406 (1966) (prohibition of comment on accused's failure to testify nonretroactive). *Stovall* v. *Denno*, *supra*, noted the fundamental difference distinguishing it from prior cases applied retroactively:

> "But the certainty and frequency with which we can say in the confrontation cases that no injustice occurred differs greatly enough from the cases involving absence of counsel at trial or on appeal to justify treating the situations as different in kind for the purpose of retroactive application . . ." (388 U. S. at 299.)

Batson likewise is different in kind from cases such as *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Jackson* v. *Denno*, 378 U. S. 368 (1964), which have been

said to go to the heart of the truth-finding process. *Stovall, supra*, 388 U. S. 297, 298.

Allen recognized that ". . . the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial. But the decision serves other values as well." 106 S. Ct. at 2880. The purposes of the *Batson* rule include ensuring that states do not discriminate against citizens summoned to judge a member of their own race and strengthening public confidence in the administration of justice as well as serving an accused's interest in neutral jury selection procedures.

Rules which serve multiple ends do not go to the heart of the truthfinding function and are unlikely to be given retroactive effect. See *Tehan* v. *Shott, supra*, *Johnson* v. *New Jersey, supra*, *Gosa* v. *Mayden*, 413 U. S. 665 (1973). The Court in *Allen, supra*, further notes that the *Batson* rule joins other procedures that protect a defendant's interest in a neutral factfinder, such as voir dire and jury instructions. "Those other mechanisms existed prior to our decision in Batson, creating a high probability that the individual jurors seated in a particular case were free from bias. Accordingly, we cannot say that the new rule has such a fundamental impact on the integrity of factfinding as to compel retroactive application." 106 S. Ct. at 2881. Petitioner has not shown any reason to disturb this finding.

While the first *Stovall* factor does not weigh in favor of retroactivity, *Allen* noted that the second and third *Stovall* factors do weigh heavily in favor of nonretroactive application of *Batson*. Retroactive appli-

cation of *Batson* to direct appeals would provoke reversals of convictions in two types of cases. It would affect cases in which a prosecutor in good-faith reliance on *Swain* attempted to select the jurors least likely to be biased against the state in a particular case in violation of the new equal protection ruling of *Batson*. *Batson* would equally affect cases in which a prima facie case of exercise of peremptories on the basis of race would be found despite the fact that the prosecutor exercised his peremptories for other reasons. The prosecutor would not likely be able to reconstruct what happened during a voir dire years earlier, and a trial judge would be unable to take into account many relevant factors at a retrospective hearing on a *Batson* claim. With respect to reliance on the *Swain* rule, *Allen* held:

> "There is no question that prosecutors, trial judges and appellate courts throughout our state and federal systems justifiably have relied on the standard of Swain." 106 S. Ct. at 2881.

The extent of reliance on *Swain* is noted in the *Batson* opinion. 106 S. Ct. 1714, fn. 1. Reliance on *Swain* is also cataloged in *Annot: Use of Peremptory Challenges to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R. 3d 14, 18, citing nearly two hundred cases supporting respondent's interpretation of *Swain* v. *Alabama*. Even the amicus brief the NAACP Legal Defense and Educational Fund, Inc., et al. in the earlier *Batson* case admitted that a prosecutor conscientiously desiring to obey the Constitution could reasonably have viewed *Swain* as allowing peremptory challenges of

blacks *qua* blacks in particular cases. (Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc., et al., No. 84-6263, pp. 48-49.)

Contrary to petitioner's argument, there was no reason for a prosecutor to make any records concerning the race of jurors peremptorily challenged or the reasons for such challenges unless it appeared that no blacks were being selected ". . . in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be. . . ." *Swain, supra,* 380 U. S. at 223. Consequently, it will be impossible in virtually every case to reconstruct the record that *Batson* held is required to rebut a prima facie case of discrimination against veniremen on the basis of race. "Under these circumstances, the reliance interest of law enforcement officials is 'compelling' and supports a decision that the new rule should not be retroactive. *Solem* v. *Stumes, supra* at 650." *Allen, supra,* 106 S. Ct. at 2881.

The impact on the administration of justice of retroactive application of *Batson* to direct appeals, while less severely disruptive than the impact on final convictions, would be substantial. What was said in *Allen* holds equally true for direct appeals:

> "Retroactive application would require trial courts to hold hearings, often years after the conviction became final, to determine whether the defendant's proof concerning the prosecutor's exercise of challenges established a prima facie case of discrimination. Where a defendant made out a prima facie case, the court then would be re-

quired to ask the prosecutor to explain his reasons for the challenges, a task that would be impossible in virtually every case since the prosecutor, relying on Swain, would have had no reason to think such an explanation would someday be necessary. Many final convictions therefore would be vacated, with retrial 'hampered by problems of lost evidence, faulty memory, and missing witnesses.' Solem v. Stumes, supra, at 650; see also Linkletter Walker, 381 U. S. at 637." 106 S. Ct. at 2881.

There is no way to determine the number of convictions that may be set aside by the retroactive application of the *Batson* rule to nonfinal appeals. The number would certainly be significant and would be an unacceptable cost of a rule that does not go to the heart of the truthfinding function. The weighing of the *Stovall* factors has resulted in a conclusion that *Batson* should not be applied retroactively on federal habeas corpus review. The same denial of retroactivity must result if the *Stovall* factors govern retroactive application of *Batson* to direct appeals. The distinction between direct appeal and collateral attack has no bearing on the purpose of the new rule, the most important factor in the *Stovall* analysis. Likewise, there is no distinction in the reasonableness of reliance on the prior rule based on the type of review involved. The only difference concerning *Batson's* possible impact on the administration of justice is that the number of cases on direct review is significant but smaller than the number of cases on collateral attack. None of the *Stovall* factors favor retroactive application of

the *Batson* rule to direct appeals. Accordingly, if the *Stovall* test applies to this case, the result must be the same as the result of the *Stovall* test in *Allen* v. *Hardy*, 476 U. S. ___, 106 S. Ct. 2878 (1986).

V. This Court Should Decline Petitioner's Invitation to Overrule *United States* v. *Johnson* and to Apply New Constitutional Rules to All Nonfinal Criminal Appeals.

Respondent has shown that under the governing retroactivity formula first adopted in *United States* v. *Johnson*, 457 U. S. 537 (1982), *Batson* should not apply to nonfinal convictions in which the jury was sworn prior to the date of the Batson opinion. Respondent has likewise shown that if the *Johnson* formula does not apply to this case, the former retroactivity rule employed in *Stovall* v. *Denno*, 388 U. S. 293 (1967), yields the same result. The weakness of Petitioner's position under both the *Johnson* and *Stovall* rules is indicated by the prominence in petitioner's brief of his argument that an entirely new retroactivity formula should be adopted by this Court. (Petitioner's Brief at 16.) Petitioner contends new constitutional rules of criminal procedure should apply to every appeal of a nonfinal conviction, as advocated by Justice Harlan. A majority of this Court has never adopted that position.

The motivating force behind the creation of any rule of nonretroactivity was stated in this Court's original foray into this arena in *Linkletter* v. *Walker*, 381 U. S. 618 (1965), as the reliance interests of those

who trusted to the existence of prior law. 381 U. S. at 624.

> "[Chief Justice Hughes] . . . reasoned that the actual existence of the law prior to the determination of unconstitutionality 'is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.' He laid down the rule that the 'effect of the subsequent ruling as to invalidity may have to be considered in various aspects.'" 381 U. S. at 625.

The reliance interest at issue in criminal cases is given considerable weight in the "clear break" exception to retroactivity established in *Johnson* and in the second and third factors employed in the *Stovall* retroactivity test. Justice Harlan's position espoused in his opinions in *Mackey* v. *United States,* 401 U. S. 667 (1971), and in *Desist* v. *United States,* 394 U. S. 244 (1969), give no consideration at all to the reliance interests of the government or to the effect on the administration of justice of retroactive application of new rules of criminal procedure to appeals from non-final convictions. Instead, the Harlan approach defines all direct appeals as part of the same "class" and seeks to cure a perceived inequity by making new constitutional rules applicable to all members of the defined class. Under the Harlan rule, two codefendants could be convicted in a joint trial. One conviction could be overturned on direct appeal due to a new constitutional rule while the other defendant's appeal

may become final in the interim, depriving the second defendant of the benefit of the new rule. The reliance interest of the state in the prior law is identical, as are the interests of the defendants in this example in whatever the purpose of the new constitutional rule may be. Yet, the retroactivity outcome is different. The Harlan approach is simply not related to the interests affecting the retroactivity question. It focuses on concerns that are not central to the retroactivity issue, but only incidental thereto. Therefore, it does not present a desirable rule for resolution of the retroactivity problem. See the dissenting opinions of Justice White in *United States* v. *Johnson,* 457 U. S. 537, 564 (1982), and *Shea* v. *Louisiana,* 470 U. S. ——, 105 S. Ct. 1065, 84 L. Ed. 2d at 51 (1985). Petitioner's invitation to adopt the Harlan approach in toto should be declined.

CONCLUSION

The decision of the Supreme Court of Kentucky affirming petitioner's conviction for robbery in the first degree and for being a persistent felony offender in the second degree should be affirmed.

Respectfully submitted,

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